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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Access Plus Fashions Inc.

Serial No. 75/135,254

Jeffrey M. Kaden of Gottlieb, Rackman & Reisman, P.C., for Access Plus Fashions Inc.

Jason Turner, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Cissel, Hairston and Walters, Administrative Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On July 18, 1996, applicant applied to register the mark shown below

On the Principal Register for "jewelry," in Class 14. The basis for filing the application was applicant's assertion

that it possessed a bona fide intention to use the mark in commerce. The Examining Attorney refused registration under Section 2(d) of the Act on the ground that applicant's mark, if used in connection with jewelry, would so resemble the mark shown below,

which is registered[1] for "jewelry," that confusion would be likely.

Applicant responded to the refusal to register by arguing that confusion would not be likely. Along with its response on the merits of the refusal, applicant submitted an amendment to allege use on the goods as of April 1, 1996.

The Examining Attorney accepted the amendment to

allege use, but was not persuaded by applicant's arguments on the issue of likelihood of confusion. The refusal to register under Section 2(d) was made final in the second Office Action.

Applicant timely filed a Notice of Appeal, attached to which as "Exhibit A" were copies from what appears to be a search report of third-party registrations. Applicant characterizes this exhibit as evidence of "uses of stylized 'V' designs."

The Examining Attorney filed his brief, and applicant filed a reply brief, but applicant did not request an oral hearing before the Board. Accordingly, we have resolved this appeal based on careful consideration of the written record and arguments.

Our determination of whether the mark in the instant application should be refused registration under Section 2(d) of the Act is based on analysis of all the probative facts and evidence which are relevant to the factors the Court identified in In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), as bearing on the issue of likelihood of confusion. In any likelihood of confusion analysis, two key considerations are the

[1] Registration No. 1,586,691,issued on the Principal Register to Village Originals on March 13, 1990; combined affidavit under

Sections 8 and 15 accepted and received.

similarities between the marks and the similarities between the goods. Federated Food, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In the instant case, we hold that confusion is likely because applicant's mark creates a commercial impression similar to that engendered by the registered mark, and the products with which these marks are used are the same.

It should be noted at the outset that when the goods or services of the respective parties are closely related or identical, as they are in the case hand, the degree of similarity between marks required to support a finding of likelihood of confusion is not as great as would apply in situations where the goods or services are diverse. ECI Division of E Systems, Inc. v. Environmental Communications Inc., 207 USPQ 443 (TTAB 1980).

Turning then, to the marks, we note that while they are clearly not identical, the stylized presentation of the letters "V" and "O" which constitutes the registered mark appears in almost the same form in the middle of the mark applicant seeks to register. Moreover, even if the stylized presentation or design in the registered mark were not interpreted as a combination of these two letters, the design appearing in applicant's mark is strikingly similar. Although these two trademarks, when considered in their

entireties, do not have similar pronunciations, and their appearances have obvious differences, the inclusion of the registered design element as the central component of applicant's mark creates a strong visual similarity. The registered mark appears to be arbitrary in connection with jewelry. Jewelry is a product purchased by ordinary consumers, who will not necessarily compare these marks on a side-by-side basis, and who do not necessarily have perfect recall, especially when it comes to trademarks used on goods purchased impulsively.

As noted by the Examining Attorney, the incorporation of the entire arbitrary registered trademark into the composite mark sought to be registered does not avoid the likelihood of confusion, it creates it. The Wella Corporation v. California Concept Corporation, 194 USPQ 419 (CCPA in 1977).

When applicant's mark, incorporating the registered mark, or a very close replica of it, is used in connection with the identical goods, namely jewelry, confusion is plainly likely. Prospective purchasers of such products who are familiar with the registered design mark in connection with these goods and who are then presented with applicant's mark, which incorporates what is essentially the same mark into the name "CAROLINE," are likely to

understand or interpret applicant's mark as an indication that the jewelry bearing it also comes from the same source as jewelry bearing only the design mark. They might think that applicant's mark identifies another line of the goods from the same manufacturer who sells jewelry under the registered mark, or that applicant's mark is an updated or newer trademark which developed from or grew out of the previously registered mark, perhaps for a new or different product line, but such people are clearly likely to assume some association or connection between the sources of jewelry products bearing marks which consist of or incorporate the same distinctive design mark.

As noted above, applicant attached to its Notice of Appeal copies of what appear to be a search report featuring third-party registrations. The Examining Attorney properly objected to consideration of this evidence, and we have not considered it. As the Examining Attorney points out, a search report is not credible evidence of the existence of the registrations listed in such a report. In order to make such registrations properly of record, copies of the registration themselves, or the electronic equivalent from Patent and Trademark Office records, must be submitted. In re Smith and Mahaffey, 31 USPQ2d 1531 (TTAB 1994). Moreover, evidence

submitted with an appeal brief is untimely under Trademark Rule 2.142(d). It does not become part of the record, and we have not considered this evidence in this case. Even more significant is the fact that even if such registrations had been timely introduced into the record in the proper way, the registrations would not be entitled to much weight on the question of likelihood of confusion. In re Hub Distributing, Inc., 218 USPQ 284 (TTAB 1983). They would not be evidence of what happens in the marketplace or that the public is familiar with the use of the marks therein. National Aeronautics and Space Administration v. Record Chemical Co., 185 USPQ 563 (TTAB 1975).

Applicant argues that when these two marks are considered in their entireties, they do not look or sound alike. Applicant points to the fact that the name "CAROLINE" is an integral and significant portion of its mark, and that to ignore this fact would clearly violate the rule against dissecting trademarks when comparing them to determine whether confusion is likely. Further, applicant contends that its mark is used only on hang tags and packaging for its jewelry, rather than being stamped directly onto the goods, as the registered mark is. Applicant goes on to argue that purchasers of jewelry are not likely to be confused by the marks as to the source of

the respective parties' goods because trademarks are not as significant or important to purchasers of jewelry, who are highly sophisticated, as they are to ordinary consumers in other fields of commerce.

None of applicant's arguments is persuasive. As we discussed above, it is when the marks are compared in their entireties that we find confusion to be likely. Confusion would plainly be unlikely if the registered design mark were compared to the name "CAROLINE" in a form that did not feature a simulation of the registered design mark in the center of the name. This is not the case before us, however. As to applicant's argument that jewelry purchasers are sophisticated consumers to whom trademarks are not as significant as they are to ordinary consumers, there is no evidence in this record in support of such a claim. Further, regarding applicant's contention that confusion is not likely because the marks are used in connection with the respective goods in different manners, we note that neither the cited registration nor the application at hand reflects any limitation or restriction regarding the manners in which these marks are used. In the absence of some limitation or restriction of this kind, we must determine whether confusion is likely between the marks on the basis of the goods as they are identified in

the application and registration, respectively. In re Elbaum, 211 USPQ 639 (TTAB 1981). When we do this, there is absolutely no distinction to be drawn between the products on which applicant and registrant use their marks.

Even if we had any doubt on the issue of likelihood of confusion, it would necessarily have to be resolved in favor of registrant and against applicant, who had a legal duty to select a mark that is totally dissimilar to trademarks already in use. Burroughs Wellcome Co. v. Warner-Lambert Co., 203 USPQ 191 (TTAB 1979).

Because applicant has incorporated into the mark it seeks to register what is essentially a close replica of the entire distinctive design which is already registered for the identical goods, we hold that confusion is likely. Accordingly, we affirm the refusal to register under Section 2(e)(1) of the Act.

R. F. Cissel

P. T. Hairston

C. E. Walters
Administrative Trademark Judges,
Trademark Trial & Appeal Board